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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALBERT ESTRADA RAMIREZ, Defendant and Appellant.	B167046 (Los Angeles County Super. Ct. No. GA051792)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph F. DeVanon, Judge. Affirmed in part and remanded in part with directions.

Cheryl R. Anderson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Supervising Deputy Attorney General, and April S. Rylaarsdam, Deputy Attorney General, for Plaintiff and Respondent.

Albert Estrada Ramirez appeals from the judgment entered following his convictions by jury of possession of cocaine base (Health & Saf. Code, § 11350, subd. (a); count one) and possession of a smoking device (Health & Saf. Code, § 11364; count two), with court findings that he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)) and a prior felony conviction for which he served a separate prison term (Pen. Code, § 667.5, subd. (b)). He was sentenced to prison for four years.

In this case, we hold (1) the court did not abuse its discretion by not disclosing information from officers' personnel files pursuant to appellant's *Pitchess* motion, (2) the court did not reversibly err by denying appellant's challenge of a juror for cause, (3) the court did not reversibly err by admitting in evidence statements which appellant made to police without being advised of his *Miranda* rights, (4) the court did not commit cumulative prejudicial error as to the above three issues, (5) multiple punishment on both counts was not barred by Penal Code section 654, but the matter must be remanded to permit the sentencing court to pronounce judgment on count two, (6) the court's failure to strike a Three Strikes law prior felony conviction was not an abuse of discretion, and (7) the court properly afforded appellant individualized sentencing as required by *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that on December 22, 2002, Monrovia Police Officer Aksel Pederson was in his marked patrol car when he received a radio call about suspicious people in the area of Royal Oaks and Sierra Terrace, and a person possibly drinking alcohol in a beige Mitsubishi Mirage.

When Pederson arrived about 11:15 a.m., he saw a parked vehicle matching the described Mirage. Pederson drove past it, made a U-turn, parked behind it, and contacted appellant. At the time, there were no other parked vehicles at the location. There were empty beer cans on the grass next to the passenger side of the Mirage.

When Pederson contacted appellant, he was seated in the driver's seat. Pederson detected a strong alcoholic odor emanating from appellant's breath and person. Pederson

also saw an empty beer can on the rear passenger floorboard. Pederson detained appellant, and Monrovia Police Officer Hugo Perez arrived and assisted with the detention.

While Perez detained appellant, Pederson walked to his car to get his citation book. He stepped on a paper bag and heard breaking glass. Pederson looked inside the bag and saw the remnants of a glass pipe used for smoking crack cocaine or methamphetamine. The bag also contained a small paper bindle inside of which was .16 grams of a substance containing cocaine in base form.

Pederson showed the bag to appellant. Appellant initially denied, but later admitted, that the bag belonged to him. Appellant told Pederson that appellant threw the bag from the Mirage when appellant saw Pederson turn onto Sierra Terrace. Appellant also stated that he had drunk about three beers earlier and had smoked a little cocaine before Pederson arrived.[1]

Perez testified that about 9:00 a.m. on the above date, he responded to the above location after receiving a call that a person was sitting in a parked beige vehicle there with empty beer cans on the ground. Perez arrived but could not find the vehicle. Just after 11:00 a.m., Perez received another call to go to the location. Perez arrived and Pederson showed him a bag containing a crushed glass pipe, a Brillo pad, and a small paper bindle inside of which was the subject controlled substance. The pad was commonly used in crack pipes.

Perez did not remember finding a lighter on appellant. Perez testified he observed some symptoms consistent with appellant being under the influence of crack cocaine, but appellant was also under the influence of alcohol. The symptoms appellant had that were consistent with his being under the influence of a controlled substance were his dry mouth and slightly dilated pupils. Perez did not conduct any evaluation of appellant to

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[1] Pederson testified during cross-examination that, before appellant told Pederson that appellant smoked crack cocaine, Pederson did not notice any symptoms that appellant was under the influence of a controlled substance. Pederson did not conduct any tests to determine if appellant was under the influence of a controlled substance. Appellant did not possess a lighter.

determine if he was under the influence of crack cocaine. In order to smoke crack cocaine through a pipe, a person would need a means to ignite it, and a cigarette lighter was a common method of smoking crack cocaine. Appellant presented no defense evidence.

CONTENTIONS

Appellant contends: (1) this court should "review the sealed documents in this case regarding officer personnel records to determine whether defense-requested discovery was adequately disclosed"; (2) "The trial court committed reversible error in denying appellant's challenge for cause to juror No. 14 [prospective juror No. 7597]"; (3) "Admission of appellant's confession over his *Miranda* objection was error, and, on this record, merits reversal"; (4) "The errors must be evaluated for their cumulative prejudicial effect"; (5) "Penal Code section 654 prohibits punishment for the possession of a smoking device conviction"; (6) "The trial court's failure to strike appellant's strike constitutes an abuse of discretion"; and (7) "The trial court failed to properly exercise its *Romero* discretion."

DISCUSSION

1. *The Court Did Not Abuse Its Discretion By Not Disclosing Information From Officers' Personnel Files Pursuant To Appellant's Pitchess Motion.*

a. *Pertinent Facts.*

On February 25, 2003, appellant filed a pretrial discovery motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (hereafter, *Pitchess* motion), seeking from Monrovia Police Department, inter alia, information in the personnel files of Pederson and Perez concerning complaints of untruthfulness or perjury. The City of Monrovia (City) opposed the motion, both in writing and at the March 17, 2003 hearing on the motion. At the conclusion of that hearing, the court granted the motion to the extent it found there was good cause to permit discovery of any such complaints.[2]

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[2] Although, in appellant's *Pitchess* motion, appellant requested more than complaints of untruthfulness or perjury against the officers, there is no dispute as to the validity of the trial court's limiting discoverable information to such complaints.

On March 17, 2003, the court indicated it would conduct an in camera hearing on the motion with the custodian of records of the Monrovia Police Department and counsel for the City. The transcript of the ensuing in camera hearing was ordered sealed. Later, in open court, the court stated, "The court has reviewed the files in camera, finds there is no discoverable information."

b. *Analysis.*

Trial courts are granted wide discretion when ruling on motions to discover police officer personnel records. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827; *People v. Memro* (1995) 11 Cal.4th 786, 832.) We have reviewed the transcript of the March 17, 2003 in camera hearing, which transcript was transmitted to this court. That transcript constitutes an adequate record of the trial court's review of any document(s) provided to the trial court, and that transcript fails to demonstrate that the trial court abused its discretion to the extent the court did not disclose information from the personnel files of Pederson and Perez. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 827; see *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1230, 1232.)

2. *The Court Did Not Reversibly Err By Denying Appellant's Challenge Of A Juror For Cause.*

a. *Pertinent Facts.*

The jury box contained 18 persons in 3 rows. The court used a "six-pack" system of jury selection with the result that, each time a person from the first two rows was excused, a person from the third row would move to the vacated seat, starting with the first person in the third row and continuing in sequence to the last person in the third row. When the last person in the third row moved to a vacated seat, a new group of six persons would be seated in the third row.

After appellant exercised the ninth of his ten peremptories, the People exercised their eighth peremptory, and appellant accepted the jury as constituted. The People subsequently exercised their ninth peremptory, with the result that the last person in the third row moved to the newly vacated seat and a new group of six persons were to be called for the third row. Instead of calling the new group, however, the court recessed.

When trial resumed, juror 3807 (that is, juror 8, second from the left in the second row) was excused for medical reasons. As a result, instead of merely calling for a new group of six persons for the third row, the court called seven persons. The court told juror 4366, the first of the seven, to become the new juror eight. The remaining six of the seven sat in the third row. The first two persons in the third row were juror 7266 and juror 7597 (juror 14, second from the left in the third row), respectively. Voir dire of the seven commenced.

During voir dire, juror 7597 stated she was a married registered nurse with two children and no jury experience. Her husband was a salesman and her cousin's husband was an attorney whom juror 7597 thought practiced more civil law than criminal law.

Later during voir dire, juror 4366 indicated that he heard the court state that this was a criminal prosecution, and the burden was on the People to prove appellant's guilt beyond a reasonable doubt or juror 4366 must vote not guilty. Appellant asked how juror 4366 would vote if he were selected as a juror and listened to the evidence presented by the prosecution, and at the close of the case he retired to deliberate and was not convinced that the prosecution had proven its case beyond a reasonable doubt. Juror 4366 said he would vote guilty "because the effects, nothing good for the life[]" (*sic*) and said he would vote guilty "[b]ecause the smoking or what you doing is no good for your health." (*Sic.*) Juror 4366 added, "[t]he system, smoking or taking is bad for the health[]," (*sic*) and he would vote guilty because he thought drugs were bad. Appellant asked juror 4366 to assume he was not satisfied beyond a reasonable doubt that appellant "had the drugs[,]" and appellant asked how juror 4366 would vote. Juror 4366 replied, "Still guilt." (*Sic.*)

Appellant subsequently asked juror 7266 if he understood the hypothetical appellant had just posed to juror 4366, and how would he vote in that situation. Juror 7266 indicated he understood the hypothetical and stated, "I might consider what the other jurors were thinking at that point and factor it into my decision." Appellant then asked how would juror 7266 vote if he had listened to the input of the other jurors

and was still not convinced beyond a reasonable doubt as to the guilt of appellant. Juror 7266 replied he would vote not guilty.

Appellant then asked juror 7597 how she would vote in that situation. Juror 7597 replied it depended on the evidence that was being presented. The following then occurred: "[Defense Counsel]: [L]et's pretend you have listened to the evidence and you go back into the jury room to deliberate and you have listened to your other jurors, but when you mull over the evidence, you are just thinking that the D.A. did not prove the case beyond a reasonable doubt. You are not satisfied that the D.A. has proven beyond a reasonable doubt Mr. Ramirez's guilt. [¶] Under that situation, how do you think that you'd vote? [¶] Prospective Juror No. 7597: Still have to weigh the circumstances."

The colloquy continued, "[Defense Counsel]: Okay. [¶] So, do you think the fact that you are a nurse -- [¶] Prospective Juror No. 7597: Uh-huh. [¶] [Defense Counsel]: -- would make you more likely to vote Mr. Ramirez guilty? [¶] Prospective Juror No. 7597: As I said, it depends on the evidence. So . . . ."

Appellant asked juror 7597 how she thought being a nurse would affect her impartiality as a juror. Juror 7597 replied, "I am not going to use, . . . , my occupation, . . . , on the decision. But as I have said, . . . , depends on what I hear in here and, . . . , what the evidence is. Just have to go from that."[3]

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[3] During later voir dire of juror 5822, appellant asked that juror how she would vote if she were not satisfied beyond a reasonable doubt as to appellant's guilt. Juror 5822 indicated that if she honestly felt she was not satisfied, she would probably vote not guilty.

The following then occurred: "[Defense Counsel]: Do you realize that you said 'probably' would say that you are not guilty. [¶] But do you realize the law says if you have a reasonable doubt, you actually have to vote not guilty? [¶] Does anybody disagree with that? [¶] Anyone think that's kind of too unfair for the prosecution?" The reporter's transcript does not reflect that any juror, including juror 7597, responded to the questions.

Later, jurors 7266, 7597, 5822, and 4366 were asked in seriatim whether he or she thought that police officers were deserving of more credibility simply because of their occupation. Each juror replied in the negative.

During subsequent voir dire by the prosecutor, the prosecutor asked a juror if he would be able to follow the judge's statements as to the law with respect to the illegality

After voir dire, appellant, at sidebar, challenged juror 4366 and juror 7597 for cause on the same ground of bias. The following occurred: "[Defense Counsel]: . . . [¶] When the people came in here, you told them the law with respect to the burden of proof and if the people don't prove their case beyond a reasonable doubt then my client is entitled to a not guilty verdict. You said that. [¶] During the course of your questioning -- well, I asked the same question to [prospective juror 4366] and he said that he would vote guilty under those circumstances. [¶] The Court: Clearly doesn't understand. I agree with it."

Appellant's counsel later stated, "And juror [7597] also would not return a verdict of not guilty even though after weighing the evidence and listening to the other people's deliberation and input she still, if she had a reasonable doubt, she still would not vote not guilty." The court granted appellant's challenge for cause as to juror 4366, then invited argument from the prosecutor as to juror 7597. The prosecutor replied, "Well, I didn't hear the evidence the same way. [¶] She indicated that she would be fair and impartial,

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of cocaine. The juror replied in the affirmative. The prosecutor asked "Would any of the rest of you?" No juror, including juror 7597, responded.

The following then occurred: "[The Prosecutor]: . . . [¶] You are a nurse. In this particular case would quantity make a difference to you if the judge indicated to you that any quantity or a usable quantity of a particular substance, cocaine, was sufficient to find someone guilty? Would that be sufficient if you heard that there was sufficient evidence to indicate that there was a usable quantity of the substance? [¶] Prospective Juror No. 7597: Uh-huh, yes." The following later occurred: "[The Prosecutor]: . . . [¶] Do you feel it has to be a kilo or a huge quantity of cocaine or anything that is usable quantity if that falls within the judge's instructions? [¶] Does anyone feel any differently as far as the law on that? That would be sufficient if the judge indicated that that was the law? [¶] Is that true, [prospective juror 7597]? [¶] Prospective Juror No. 7597: Yes."

The following colloquy later occurred: "[The Prosecutor]: . . . [¶] . . . [¶] As a nurse, [prospective juror 7597], do you have any specific information or do you work with narcotics, have special knowledge what a usable quantity of narcotics is? [¶] Prospective Juror No. 7597: I don't work with cocaine or marijuana or something like that. But we give, . . . , medications like morphine, Demerol and stuff. [¶] [The Prosecutor]: You heard quantities and you would listen to the evidence and the law and you would be able to follow that? [¶] Prospective Juror No. 7597: Yes."

and asked if in any way her occupation, specifically her special knowledge, would cause her to -- she said she'd be fair to both sides. That's what I heard."

The court denied the challenge for cause as to juror 7597, stating "I think she is -- having watched she was somewhat confused. She answers each of your questions both ways. But I am satisfied having listened to her answers she would make a good faith effort to be fair to both sides, and I think she understands that is her obligation in this courtroom."

Juror 7266, then in the third row, replaced juror 4366 and became juror 8. Appellant later used his tenth and last peremptory to excuse juror 7266. Juror 7597, whom appellant unsuccessfully had challenged for cause, replaced juror 7266. Appellant did not then, or subsequently, request an additional peremptory challenge from the court. The People accepted the jury as constituted and the jury was sworn. Two alternates were subsequently sworn. The remaining prospective jurors in the third row, along with prospective jurors in the gallery, were ordered to return to the jury room. The court indicated that witnesses were to be ready the next day and the parties should consider jury instructions.

The following then occurred: "[Defense Counsel]: I wanted to put something on the record, that I am not satisfied with the way this jury is presently constituted. I had to exercise a peremptory on -- my last peremptory -- [on] [juror 7266] [¶] . . . [¶] The Court: The lawyers seldom are."

b. *Analysis.*

In the present case, after appellant exercised his ninth peremptory, he challenged two jurors for cause, juror 4366, who was then in the second row, and juror 7597, who was then in the third row. Appellant could not then exercise a peremptory as to juror 7597, since peremptories could be exercised only as to jurors in the first two rows. His challenge for cause as to jurors 4366 and 7597 was successful only as to juror 4366 (juror 8), who was replaced by juror 7266, and appellant later exercised his tenth and last peremptory on juror 7266. Juror 7597 then replaced juror 7266 but, by that time, appellant had exhausted his statutory allotment of peremptories with the result that he

could not, from that allotment, peremptorily challenge juror 7597 whom appellant unsuccessfully had attempted to challenge for cause.

In *People v. Weaver* (2001) 26 Cal.4th 876, our Supreme Court concluded that a defendant challenging on appeal the denial of a challenge of a juror for cause must have exercised a peremptory to remove the juror in question, otherwise the issue is waived. (*People v. Weaver*, *supra*, 26 Cal.4th at p. 911.) Moreover, cases from our Supreme Court, as well as appellate cases, discussing the waiver issue have considered whether the defendant requested an additional peremptory to use to excuse the juror at issue. (*Weaver*, *supra*, 26 Cal.4th at pp. 910-911; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1088-1099; *People v. Shambatuyev* (1996) 50 Cal.App.4th 267, 271-273; *People v. Terry* (1994) 30 Cal.App.4th 97, 100-104.)

Appellant did not exercise a peremptory as to juror 7597. It is true that appellant could not have exercised a statutorily allotted peremptory as to juror 7597 after appellant's challenge for cause as to her was denied and while she was still seated in the third row. It is also true that appellant could not have exercised such a peremptory after juror 7597 was moved to the second row, since by then appellant had exhausted such peremptories.

Nonetheless, once juror 7597 was moved to the second row, appellant could have requested, but did not request, an additional peremptory to use to excuse juror 7597, and appellant first expressed dissatisfaction with the jury after the jury and alternates were sworn, and after the court had discussed unrelated matters. We conclude appellant waived the issue of whether the court erroneously denied his challenge of juror 7597 for cause. (Cf. *Weaver*, *supra*, 26 Cal.4th at pp. 910-911; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1088-1099; *People v. Shambatuyev* (1996) 50 Cal.App.4th 267, 271-273; *People v. Terry* (1994) 30 Cal.App.4th 97, 100-104.)[4]

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[4] Appellant urges, "although appellant, through his trial counsel, expressed his dissatisfaction with the jury after they were sworn and did not request additional peremptory challenges, given the judge's comment that lawyers are seldom satisfied with the panel, it is clear appellant would not have gained additional peremptory challenges

Moreover, even if the issue were preserved for review, "A challenge to a prospective juror should be sustained when the juror's views would 'prevent or substantially impair' the performance of his or her duties as a juror in accordance with the instructions and oath. [Citations.] If the prospective juror's responses to voir dire questions are conflicting or equivocal, the trial court's determination is binding on the reviewing court. [Citation.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 456-457.) Where a prospective juror gives conflicting answers to questions relevant to said juror's impartiality, the trial court's determination as to that juror's state of mind is binding upon an appellate court. (*People v. Earnest* (1975) 53 Cal.App.3d 734, 750.) When the juror consistently affirms the juror's willingness and ability to act impartially in weighing the evidence and applying the law upon which the juror will be instructed, there must be facts which clearly show the juror's bias to warrant a reversal of the trial judge's decision. (*Ibid.*)

In the present case, the trial court reasonably could have understood juror 7597's answer that it would "depend on the evidence" as indicating, in context, that her opinion concerning guilt would not depend merely upon other jurors' opinions. Juror 7597's later answer, "Still have to weigh the circumstances[,]" followed appellant's compound question in which he asked, inter alia, what she would do after "mull[ing]" over the evidence and "thinking" the case had not been proven beyond a reasonable doubt. Thus, juror 7597 reasonably could have understood appellant to be asking what she would do if

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even if he had expressed dissatisfaction earlier. Any earlier expression would have been futile in this respect. (See *People v. Hill* (1998) 17 Cal.4th 800, 820 [there is a general exception to the waiver rule where an objection would have been futile]; . . .)" We disagree, reject appellant's suggestion that the court's commonplace could operate to negate waiver, and note the court's deference to appellant in granting his challenge of juror 4366 for cause.

she pondered the evidence but had not yet *concluded*, based on her ponderings,[5] that the standard of proof had not been met.

Moreover, juror 7597 indicated that the fact that she was a nurse would not adversely affect her impartiality, and she would decide the case based on the evidence. Later, juror 7597, like the rest of the jury (1) expressed no disagreement with the proposition of law that if a juror had a reasonable doubt, the juror would have to vote not guilty, or (2) did not indicate that that proposition was too unfair for the prosecution. She, like other jurors, denied that police officers were deserving of more credibility simply because of their occupation. She, like other jurors, later expressed no qualm when the prosecutor asked if she would be able to follow the judge's statements as to the law with respect to the illegality of cocaine. Juror 7597 indicated she would have no problem with the court's instructions concerning the requisite amount of cocaine. She said she "heard quantities" and "would listen to the evidence and the law and . . . would be able to follow that[.]"

The court indicated it had watched juror 7597 during her voir dire, she was somewhat confused, and she answered each of the parties' questions both ways. But the court concluded that juror 7597 would make a good faith effort to be fair to both sides, and the court thought she understood that that was her obligation. The court's denial of appellant's challenge of juror 7597 for cause was not error. (Cf. *People v. Mincey*, *supra*, 2 Cal.4th at pp. 456-457; *People v. Earnest*, *supra*, 53 Cal.App.3d at pp. 734, 750.)[6]

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[5] One meaning of the word "mull" is to "ponder[.]" (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 762, some capitalization omitted.) This definition does not suggest that the pondering has culminated in a well-considered conclusion.

[6] In light of our conclusion that the trial court's denial of appellant's challenge of juror 7597 for cause was not erroneous, we reject appellant's claim that his "trial counsel's failure to properly raise a federal constitutional objection regarding" juror 7597 constituted ineffective assistance of counsel under the federal and state Constitutions. Since, on the merits, the trial court's denial of appellant's challenge was not error, no ineffective assistance prejudice resulted from any failure by his trial counsel to raise properly said objection. (Cf. *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.)

3. *The Court Did Not Reversibly Err By Admitting In Evidence Statements He Made To Police Without Being Advised Of His Miranda Rights.*

a. *Pertinent Facts.*

The record of an admissibility hearing reflects that on December 22, 2002, Pederson responded to a location near Sierra Terrance and Royal Oaks. Pederson was going to the location because he had been advised by radio that a suspicious vehicle was there.

About 11:15 a.m., Pederson, who was by himself, arrived at the location and saw a parked car matching the vehicle described in the radio call. The car was on the east side of Sierra Terrace and facing northbound. Appellant was seated in the driver's seat. Pederson parked his patrol car about a car length behind appellant's car.

Pederson approached appellant's car and conversed with appellant. Pederson looked inside the car and saw an open container of beer in the area of the right rear passenger floorboard. Pederson also detected an alcoholic odor emanating from appellant's breath and person. Based on that odor, Pederson asked appellant to exit his car. Pederson testified he brought appellant out of the car and had him sit on the curb behind appellant's car.

The following then occurred: "Q Either at that time or -- when you had him exit the vehicle or at any time, did you have an additional conversation with him? [¶] A Yes. [¶] Q And when did that conversation take place? [¶] A Just prior to asking him to exit the vehicle, I asked him if he was on probation or parole." Appellant responded to Pederson in the affirmative, but Pederson testified he did not remember whether appellant said he was on probation or whether he said he was on parole.

The following then occurred: "Q And other than the statement that he made about being on probation or parole, did you ask him other information about his identification or who he was? [¶] A Yes. [¶] Q And did he respond to those questions? [¶] A Yes. [¶] Q Based on that, what did you do next? [¶] A Based on what I had seen in the vehicle, as well as on his person, that's when I asked him to exit the vehicle and sit on the curb behind the vehicle so I can issue him a citation." Less than five minutes elapsed

from the time Pederson first contacted appellant to the time Peterson had him sit on the curb.

After appellant sat on the curb, Perez arrived. Less than five minutes elapsed from the time Pederson first came upon appellant to the time Perez arrived. When Perez arrived, Pederson advised him that Pederson was going to issue a citation to appellant for the open container violation, and Pederson asked Perez to watch appellant while Pederson went back to his vehicle and got his citation book. When Pederson asked Perez to watch appellant, appellant was seated on the curb behind his vehicle.

At some point, Pederson left appellant's location. Pederson was walking back to his patrol car to get his citation book and, as Pederson was walking in the street, he stepped on a brown bag and heard breaking glass. Pederson picked up the bag. He did not know if he would cut himself, so he brought the bag to the front hood of his patrol car and opened the bag. After opening it, Pederson saw something that he believed was an illegal substance.

Pederson closed the bag, brought it to appellant, and asked him if it were his. Appellant initially denied that the bag was his. Pederson again asked about the bag. Based on appellant's earlier statement that he was probation or parole, Pederson advised appellant that it was important for appellant to tell the truth. Pederson testified that appellant then told Pederson that appellant had the bag in appellant's car and had thrown it when he had seen Pederson's patrol car coming southbound on Sierra Terrace. The following then occurred: "Q And did he indicate anything else about the substance that was in the bag in addition to having possession of the bag? [¶] A He stated that he had drank 3 beers earlier and smoked a little cocaine prior to my arrival."

During cross-examination, Pederson testified that, during the course of his encounter with appellant, Pederson was in uniform and visibly armed. Pederson had been called to the scene because he had received a call concerning suspicious activity, and concerning someone seated in a car, possibly drinking alcohol. When Pederson arrived, appellant's car was legally parked. Pederson testified that appellant was not free to go until Pederson issued the citation, but Pederson did not testify whether he told that

to appellant. Pederson did not advise appellant of his *Miranda* rights before Pederson asked him about the contents of the bag. Less than 10 minutes elapsed from the time Pederson encountered appellant in his car to the time appellant made his statements.

During redirect examination, Pederson denied that, when he approached with his patrol car, Pederson had any lights or sirens activated. Pederson testified that he never handcuffed appellant, and there were no guns drawn on appellant. The following then occurred: "Q Was the defendant ever told he was under arrest? [¶] A After the statements made about the bag, then he was advised he was under arrest. [¶] Q Prior to the statements made by the defendant, was he ever told he was under arrest? [¶] A No." During recross-examination, Pederson testified the patrol cars of Pederson and Perez were marked patrol cars, and Perez was in uniform and armed.

During argument at the hearing, appellant urged that Pederson's questions to appellant concerning the bag constituted custodial interrogation, and appellant asked the court to exclude appellant's responding statements since he had not been advised of his *Miranda* rights. The following then occurred: "The Court: [t]he motion to suppress the statement is denied. [¶] Seems clear to the court the defendant was not in custody, for purposes of *Miranda*, he was not under arrest. Clearly the matter was still in the investigatory stage. Defendant was detained, but the mere fact he was detained does not give rise to police requirement to advise the defendant of his *Miranda* rights. And for those reasons the court denies the defense request." The substance of the statements appellant made to Pederson after he found the bag were admitted in evidence at trial.

b. *Analysis.*

Appellant claims that Pederson's questions leading to appellant's statements about the bag constituted custodial interrogation for purposes of *Miranda*, therefore, the statements should have been excluded since he was not advised of his *Miranda* rights. To determine the issue, "[d]isregarding the uncommunicated subjective impressions of the police regarding defendant's custodial status as irrelevant, we consider the record to determine whether defendant was in custody, that is, whether examining all the circumstances regarding the interrogation, there was a '"formal arrest or restraint on

freedom of movement" of the degree associated with a formal arrest.' [Citation.] As the United States Supreme Court has instructed, 'the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation.' [Citation.]" (*People v. Stansbury* (1995) 9 Cal.4th 824, 830.)

Moreover, in *People v. Clair* (1992) 2 Cal.4th 629, our Supreme Court stated, "The *Miranda* court itself declared that 'General on-the-scene questioning as to facts surrounding a crime . . . is not affected by our holding.' [Citation.] . . . [¶] . . . [¶] [T]he term ["custody"] 'encompasses any situation in which "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."' [Citations.] Generally, however, it does not include a temporary detention for investigation. (See *Berkemer v. McCarty* [(1984)] 468 U.S. [420,] 439-440 . . . .) Such a detention, as noted, allows 'the officer . . . [to] ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions.' (*Id.* at p. 439.)" (*People v. Clair*, *supra*, 2 Cal.4th at p. 679.)

"Case law has identified a number of objective indicia of custody for *Miranda* purposes, such as (1) whether the suspect has been formally arrested, [fn. omitted] (2) absent formal arrest, the length of the detention, [fn. omitted] (3) the location, (4) the ratio of officers to suspects, (5) the demeanor of the officer, including the nature of the questioning." (*People v. Lopez* (1985) 163 Cal.App.3d 602, 608 (*Lopez*).) Finally, "a person may be technically under arrest after being stopped for a traffic violation . . . , without being subjected to the type of custodial interrogation which requires *Miranda* advice during a transitory detention." (*Lopez*, *supra*, 163 Cal.App.3d at p. 608, fn. 2.)

In the present matter, Pederson received a call concerning a suspicious vehicle, suspicious activity, and someone seated in a car, possibly drinking alcohol. There is no dispute that Pederson lawfully approached appellant and conversed with him. Moreover, it is undisputed that, before appellant exited the car, Pederson lawfully (1) had seen an open container of beer in the area of the right rear passenger floorboard, (2) had detected alcohol emanating from appellant's breath and person, (3) determined appellant was on

probation or parole, and (4) obtained identification information from appellant. It is undisputed that any detention that occurred when Pederson had appellant sit on the curb was reasonable, since the above circumstances provided an objective manifestation that appellant had an open container of alcohol in his vehicle (Veh. Code, §§ 23222, subd. (a), 23223, 23225, 23226) sufficient to justify an investigatory detention concerning those offenses.

Pederson was alone with appellant during the above events; Perez came later. After Perez arrived, Pederson advised him that Pederson was going to issue a citation to appellant for the open container violation, and Pederson asked Perez to watch appellant while Pederson went back to his vehicle and got his citation book. Pederson was walking back to his patrol car to get his citation book when he came upon the bag.

As the court observed in *People v. Monroe* (1993) 12 Cal.App.4th 1174, "a Vehicle Code violator is *technically* under arrest when an officer has probable cause to believe that person has committed a Vehicle Code offense, and begins the process of issuing a citation to appear in court." (*People v. Monroe*, *supra*, 12 Cal.App.4th at p. 1183, fn. 5, italics added.) When an officer "*determines* there is probable cause to believe that an offense has been committed and *begins* the process of citing the violator to appear in court (Veh. Code, §§ 40500-40504), an 'arrest' takes place at least in the technical sense: 'The detention which results [during the citation process] is ordinarily brief, and the conditions of restraint are minimal. Nevertheless the violator is, during the period immediately preceding his execution of the promise to appear, under arrest. [Citations.] Some courts have been reluctant to use the term "arrest" to describe the status of the traffic violator on the public street waiting for the officer to write out the citation [citations]. The Vehicle Code, however, refers to the person awaiting citation as "the arrested person." Viewing the situation functionally, the violator is being detained against his will by a police officer, for the purpose of obtaining his appearance in connection with a forthcoming prosecution. The violator is not free to depart until he has satisfactorily identified himself and has signed the written promise to appear.' (Fns. omitted.) [Citation.]" (*People v. Superior Court* [(*Simon*) (1972)] 7 Cal.3d 186, 200.)

Accordingly, appellant was, arguably, "arrested" when Pederson determined he had probable cause to believe appellant had an open container of alcohol in violation of the Vehicle Code and, detaining appellant, began the process of citing appellant when Peterson began walking to his patrol car for the purpose of getting his citation book.

However, as discussed, "a person may be technically under arrest after being *stopped* for a traffic violation . . . , without being subjected to the type of *custodial* interrogation which requires *Miranda* advice during a transitory detention." (*Lopez*, *supra*, 163 Cal.App.3d at p. 608, fn. 2, italics added.) There is no reason to conclude differently where, as here, appellant was already stopped by the time Pederson arrived, and, arguably, Pederson only later made the probable cause determination and began the citation process.

Moreover, the length of appellant's detention was brief. The initial detention occurred during daylight hours on a city street, and involved a single officer. Even when Perez later arrived, there were only two officers present. Nothing indicates that the demeanor of the officers was coercive. The lights and sirens of Pederson's patrol car were not activated, appellant was not handcuffed, and the officers' guns were not drawn. Significantly, even if Pederson determined he had probable cause to arrest appellant for a Vehicle Code violation and began the citation process, and even if this constituted a technical arrest, Pederson never told appellant he was under arrest prior to his statements. Accordingly, based on how a reasonable man in *appellant's* shoes would have understood his situation, this was no more than a lawful brief investigatory detention. No *Miranda* advisement was required before Pederson asked appellant questions concerning the bag, since no *custodial* interrogation had occurred by that time. (Cf. *People v. Stansbury*, *supra*, 9 Cal.4th at p. 830; *People v. Clair*, *supra*, 2 Cal.4th at p. 679; *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1160-1165; *Lopez*, *supra*, 163 Cal.App.3d at p. 608.)[7]

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[7] Appellant claims that the cumulative effect of the errors he discusses in his first three contentions mandates reversal of the judgment. We conclude there was no error to accumulate.

4. *Multiple Punishment On Counts One And Two Was Not Barred By Penal Code Section 654, But The Matter Must Be Remanded.*

Appellant's sentence consisted of the two year middle term on count one, doubled to four years pursuant to the Three Strikes law. The sentencing minute order and the abstract of judgment each reflect that the court imposed a concurrent six-month sentence as to count two. However, the reporter's transcript does not reflect that the court orally pronounced judgment as to count two. The court struck the Penal Code section 667.5, subdivision (b), enhancement. Appellant's total prison sentence was four years.

Appellant claims multiple punishment on counts one and two was barred by Penal Code section 654. He urges he possessed the pipe to smoke the subject cocaine base. We reject appellant's claim.

Familiar principles govern appellate review of Penal Code section 654 issues.[8] In the present matter, as to count one, appellant's criminal intent and objective was to possess cocaine base. As to count two, appellant's criminal intent and objective was to possess a smoking device.

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[8] In *People v. Perez* (1979) 23 Cal.3d 545, the Supreme Court observed, "it is well settled that [Penal Code] section 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.] Whether a course of conduct is indivisible depends upon the intent and objective of the actor. [Citation.] If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez*, *supra*, 23 Cal.3d at p. 551.) *Perez* also observed, "[o]n the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct." (*People v. Perez*, *supra*, 23 Cal.3d at p. 551.) The issue of whether Penal Code section 654, is factually applicable is for the sentencing court to decide, and the law gives the sentencing court broad latitude in making this determination. Its findings, including implied findings, on this question must be upheld on appeal if there is any substantial evidence to support them. (Cf. *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; *People v. Saffle* (1992) 4 Cal.App.4th 434, 438; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190.)

The purpose of Penal Code section 654, is to insure that a defendant's punishment is commensurate with culpability. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) Appellant admitted to Pederson that appellant had smoked a little cocaine before Pederson arrived. Perez observed symptoms consistent with appellant's being under the influence of crack cocaine. If, as appellant suggests, a sentencing court reasonably could conclude that appellant possessed the pipe to smoke the cocaine base in the bindle, such a court also reasonably could conclude that he earlier had possessed the pipe to smoke the cocaine which he smoked before Pederson arrived. The sentencing court also reasonably could have concluded that appellant possessed the pipe to smoke methamphetamine, or to smoke cocaine, or cocaine base, other than any cocaine or cocaine base which appellant had that day. In short, there was substantial evidence that appellant had a single criminal objective as to count one, but multiple criminal objectives as to count two.

We conclude there was substantial evidence that, when committing counts one and two, appellant entertained multiple criminal objectives which were independent of and not merely incidental to each other (*People v. Perez*, *supra*, 23 Cal.3d at p. 551), and hold that multiple punishment on counts one and two was not barred by Penal Code section 654.

However, we note, as does respondent, that there is an issue as to whether the court below sentenced appellant on count two at all. "After a conviction, following either a plea or verdict of guilty, the court must pronounce judgment upon the defendant [citations], i.e., impose a fine or sentence of imprisonment. [Citation.] Pronouncement of judgment must be done orally. [Citation.] To do so the court must 'utter' its determination in the premises. (*Ibid*.) This is a judicial act. [Citations.] Entry of the judgment in the minutes records the action of the court in the premises; is a ministerial act [citations]; and does not constitute 'pronouncement' of judgment." (*People v. Blackman* (1963) 223 Cal.App.2d 303, 307.)

The reporter's transcript and clerk's transcript conflict as to whether the court pronounced judgment as to count two. Specifically, the reporter's transcript reflects no oral pronouncement of judgment as to that count, while the sentencing minute order and

abstract of judgment each reflect appellant was sentenced on that count. In these circumstances, the reporter's transcript prevails over the clerk's transcript, and we conclude the court did not pronounce judgment on count two. (Cf. *People v. Mesa* (1975) 14 Cal.3d 466, 471.)

"In a case where the court fails to pronounce judgment with respect to counts on which convictions were validly obtained, the Court of Appeal has power to remand for the purpose of pronouncement of a judgment in accordance with the verdict." (*People v. Taylor* (1971) 15 Cal.App.3d 349, 353.) Since concurrent or consecutive sentencing is conceivably available on count two, we will remand this matter so the sentencing court can pronounce judgment on count two. We express no opinion on whether the court should impose concurrent or consecutive sentencing on that count.

5. *The Court Did Not Abuse Its Discretion By Failing To Dismiss Appellant's Strike, And The Court Properly Gave Appellant Individualized Sentencing.*

a. *Pertinent Facts.*

The information alleged, inter alia, the present offenses and that appellant suffered a Three Strikes law prior felony conviction (strike) based on appellant's April 9, 1998 conviction for first degree burglary in case No. GA035391. The information also alleged that appellant suffered two prior felony convictions for which he served separate prison terms, one based on case No. GA035391, and one based on his May 25, 1999 conviction for burglary in case No. GA039083.

The preconviction probation report prepared for a January 2003 hearing reflects appellant was born in August 1968 and has two aliases. The report reflects appellant's criminal record as follows. In December 1994, appellant was arrested on multiple charges and, in January 1995, in that case, he was convicted of driving without a driver's license in violation of Vehicle Code section 12500, subdivision (a). In June 1995, appellant was arrested for driving with a suspended license and, in that case, in July 1995, he suffered a misdemeanor conviction for that offense and was placed on summary probation for one year.

In March 1998, appellant was arrested for burglary and, in April 1998, in that case (case No. GA035391), he was convicted of first degree residential burglary, a felony. Imposition of sentence was suspended and appellant was placed on probation for three years. However, on May 26, 1999, probation was revoked and appellant was sentenced to prison for two years concurrent with a sentence in case No. GA039083. In March 1999, appellant was arrested for burglary and, on May 25, 1999, in that case (case No. GA039083), he was convicted of second degree burglary, a felony, and sentenced to prison for 32 months.[9] His prison commitment began on June 7, 1999.

The probation officer stated, "[Appellant] in this matter has two prior felony convictions for first degree burglary [*sic*] which resulted in his commitment to state prison in 1999. [Appellant] had been without serious prior criminal behavior prior to his felony convictions as well as subsequent to his release from prison. However, [appellant's] prior felonies appear to indicate he may be ineligible for probation due to the special allegation. [Appellant] appears to be a 34-year-old naturalized United States citizen who has experienced residential and perhaps employment instability subsequent to his release from prison."

The probation officer continued, "[Appellant] appears to have a substance abuse problem as he had apparently been drinking alcoholic beverages on the street and using cocaine prior to his arrest. Since the offense involved in this matter did not contain

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[9] The report states that the "O.R. investigator recorded the defendant's denial of the use of drugs and received the defendant's admission that he drinks on weekends." Appellant told the O.R. investigator that he had been residing for six years with his aunt, and would return there upon release from custody. The report states that "[a]ppellant's aunt told the O.R. investigator that she had no idea where [appellant] has been residing during the past . . . three years. He is possibly residing on the streets." Appellant's aunt indicated he could not reside with her if released, because he would not act responsibly. She did not understand why appellant continued to give her address and phone as his own. Appellant gave employment information to the probation officer, but asked that his employer not be contacted since appellant intended to return to work. The report reflects that appellant's brother told the probation officer that appellant had been working through a temporary agency. The report also reflects that appellant "was said to have been living in his car prior to his arrest."

elements of violence, or victimization, and [appellant] apparently did well enough under parole supervision that he is no longer subject to parole considerations, the court may wish to consider providing [appellant] with an opportunity at rehabilitation in the community. However, due to the fact that [appellant] appears ineligible at this time, the following recommendation has been made."

The report lists as aggravating factors that appellant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings were numerous or of increasing seriousness, and that appellant had served a prior prison term. The report indicated there were no mitigating factors, and recommended appellant's imprisonment for the "high-base" term.

In March 2003, appellant was convicted by jury of the present offenses. In April 2003, appellant filed a request that the court dismiss the strike allegation. The request listed as factors supporting dismissal that the current offense was minor and a lengthy sentence would be imposed even absent the strike. The request listed as additional miscellaneous factors that appellant's prior convictions arose from a single period of aberrant behavior for which he served a single prison term, he cooperated with police, his crimes were related to drug addiction, and his criminal history did not include actual violence.

In the written request, appellant stated he had a drug problem and he was convicted in the present case of possessing cocaine and a crack pipe. He also stated, "Mr. Ramirez's prior conviction was for a residential burglary. Mr. Ramirez worked as security personnel and burglarized a home that he knew was unoccupied. A residential burglary is considered a serious felony because of the potential for violence inherent in the crime should the burglar encounter the resident. Mr. Ramirez's prior residential burglary is less serious because the potential for violence was removed. Mr. Ramirez[] ensured that the property he burglarized was unoccupied. This lessened considerably any potential for violence occurring."

At a May 1, 2003 court trial on prior conviction allegations, the evidence established the following. In April 1998, appellant pled guilty to first degree residential

burglary in case No. GA035391, and sentence was pronounced in that case on May 25, 1999. On May 25, 1999, appellant pled guilty to second degree commercial burglary in case No. GA039083, and sentence was pronounced in that case on May 25, 1999. The court found that appellant suffered those prior convictions.

At sentencing on May 1, 2003, appellant urged that the strike was over five years old, and this provided a ground for the court to strike it. He reiterated arguments in his written request that his strike arose from his burglary of an unoccupied house, the court should look at the nature of the current offenses, and he had a drug problem.

The People opposed appellant's request to dismiss the strike, urging appellant was on parole at the time of the present offenses, the strike was too recent, and it was inappropriate to consider the facts of the offense underlying the strike. Appellant disputed that he was on parole at the time of the present offenses. The court noted that the probation report did not indicate that appellant was on parole. The prosecutor suggested that he had supposed that appellant was on parole at the time of the present offenses based on the date of his prison commitment. The court indicated that the prosecutor had offered no evidence that appellant was on parole at the time of the present offenses.

The court then stated, "At any rate, the court is going to deny the motion to strike basically because I don't find five years -- five-year residential prior to be appreciably long period of time, particularly in view of the fact after picking up the residential prior the defendant went out and picked up another burglary conviction, which he also returned to state prison. [¶] Under any reading of *Romero*, I don't believe he would be entitled to any other consideration of having a prior conviction stricken for purposes of sentencing, so the court will deny the motion to strike for those stated reasons."

The court sentenced appellant to the two year middle term on count one, doubled to four years pursuant to the Three Strikes law. The court struck the Penal Code section 667.5, subdivision (b), enhancement.

b. *Analysis.*

Appellant presents related contentions that the court abused its discretion by failing to strike appellant's strike, and the court failed to properly exercise its discretion by affording appellant individualized sentencing under *People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th 497. As to the former contention, appellant urges the present offenses were relatively unremarkable, there was evidence of personal drug use but not intent to sell, and, during the present offenses, no one was hurt and no property damage occurred. Appellant also urges the present strike was relatively remote, his priors were of decreasing seriousness, the present offense was not a serious or violent felony, and he had a substance abuse problem. As to the latter contention, appellant urges the court did not afford him individualized sentencing, but merely relied on his criminal history. We reject the contentions.

It is true that a prior conviction can be stricken if it is remote in time. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) However, the record reflects that appellant has not led a legally blameless life before or after the 1998 conviction that served as the strike. We conclude there is nothing mitigating about the age of appellant's 1998 robbery conviction. (Cf. *People v. Humphrey*, *supra*, 58 Cal.App.4th at p. 813.) Moreover, we reject appellant's argument that his prior crimes were of decreasing seriousness. Further, on the issue of individualized sentencing, we note the trial court considered not merely appellant's criminal history but the present offenses when the court indicated there was no evidence that appellant was on parole at the time of the present offenses. The court also indicated that, under any reading of *Romero*, appellant was not entitled to "any other consideration" for having the strike stricken.

The court read the probation report, appellant's request to dismiss the strike, and heard argument from the parties. If we accepted appellant's contentions, we would be holding that the court's denial of appellant's request to dismiss the strike was irrational, capricious, or patently absurd (*People v. Delgado* (1992) 10 Cal.App.4th 1837, 1845; *In re Arthur C.* (1985) 176 Cal.App.3d 442, 446) and without even a fairly debatable justification. (*People v. Clark* (1992) 3 Cal.4th 41, 111.) Based on the record in the

present case, we cannot come to that conclusion. In light of the nature and circumstances of appellant's current felony offense and the strike, and the particulars of his background, character, and prospects, appellant cannot be deemed outside the spirit of the Three Strikes law as to the strike, and may not be treated as though he previously had not suffered it. (Cf. *People v. Williams* (1998) 17 Cal.4th 148, 161-164.)

We hold that the trial court's order refusing to dismiss the strike was sound, and not an abuse of discretion. (Cf. *People v. Williams*, *supra*, 17 Cal.4th at pp. 158-164; *People v. DeGuzman* (1996) 49 Cal.App.4th 1049, 1054-1055; *People v. Askey* (1996) 49 Cal.App.4th 381, 389.) None of the cases cited by appellant, or his argument, compels a contrary conclusion.

DISPOSITION

The matter is remanded and the sentencing court is directed to pronounce judgment as to count two, thereby correcting the judgment to conform with appellant's conviction by jury of possession of a smoking device as to that count. In all other respects, the judgment is affirmed. The trial court is further directed to forward to the Department of Corrections an amended abstract of judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, J

We concur:

KLEIN, P.J.

ALDRICH, J.